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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

No. 181

EMIL RECK,

Petitioner.

vs.

JOSEPH E. RAGEN, Warden,

Respondent.

(On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.)

BRIEF FOR RESPONDENT.
Certificate of Service.

RESPONDENT'S ACCEPTANCE OF PETITIONER'S STATEMENT OF THE CASE.

In obedience to the practice prevailing at the bar of this Court, we do not restate the full substance of the evidence in this Statement of the Case; for the substance of that evidence is fully stated in the opinion of the Court of Appeals (274 F. 2d 250, *reprinted in full as Appendix to the Petition for Certiorari*, pp. 1 to 11) and in the brief for petitioner.

We comment upon the important details of the evidence under Point II of the Argument, *post*.

THE QUESTIONS PRESENTED.

In the view of the Attorney General of Illinois, the only question that this Court need decide is:

> 1. MUST THIS COURT OVERTURN THE CONCORDANT FINDINGS OF PETITIONER'S JURY, THE TRIAL JUDGE AT HIS ORIGINAL TRIAL, THE TRIAL JUDGE IN HIS POST-CONVICTION HEARING IN ILLINOIS, A UNANIMOUS SUPREME COURT OF ILLINOIS, THE DISTRICT COURT AND TWO JUDGES OF THE COURT OF APPEALS THAT PETITIONER'S CONFESSION WAS VOLUNTARY AND WAS NOT OBTAINED IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW?

Respondent submits that the question stated above should be answered in the negative and that when so answered, no other question need be decided.

But the district court's opinion raises and petitioner presses upon this Court two other questions, which are:

> 2. WAS THE DISTRICT COURT'S FINDING THAT PETITIONER'S CONFESSION WAS EXACTED BY "PSYCHOLOGICAL" COERCION, THE DISTRICT COURT EXPLICITLY FINDING THAT THAT CONFESSION WAS NOT THE RESULT OF "PHYSICAL" COERCION, "SO CLEARLY ERRONEOUS", THAT IT DID NOT BIND THE COURT OF APPEALS AND SHOULD NOT BIND THIS COURT?
>
> 3. IF THE DISTRICT COURT'S FINDING THAT PETITIONER'S CONFESSION WAS THE RESULT OF "PSYCHOLOGICAL" BUT NOT OF "PHYSICAL" COERCION, WAS THE DISTRICT COURT CORRECT IN APPRAISING THIS CASE BY THE CONSTITUTIONAL NORMS PREVAILING IN 1936, THE TIME OF PETITIONER'S TRIAL, AND NOT IN THE LIGHT OF THE "EVOLUTION" AND "EXPANSION" OF THE CONCEPT OF DUE PROCESS BY THIS COURT'S LATER DECISIONS?

SUMMARY OF ARGUMENT.

I. and II.

The evidence, examined in detail in the Argument, *post*, supports the findings of the jury, the trial judge who heard the case, the trial judge who considered the case on State post-conviction proceedings, a unanimous Supreme Court and two judges of the Court of Appeals that petitioner's confession was voluntary when tested by any standards. The voluntary character of that confession was attested by the disinterested *physicians*, not employed by any governmental agency, who observed petitioner at the very time that he made his final confession and confirmed his prior confessions. None of those physicians observed any of the physiological, neurological or psychological *stigmata* of which petitioner first complained many years after his conviction.

The concordant finding that there was no *physical* duress is sustained by the evidence of all of the judges who have considered this case, including the district court and the dissenting judge of the court of appeals.

III.

The district court's finding that "psychological" duress produced the confession is in conflict with the determination of all of the Illinois jurors and judges who passed upon this case and is inconsistent with the district court's own finding that there was no "physical" coercion.

The finding of "psychological coercion" is clearly erroneous.

IV.

If this Court must pass upon the trial court's holding that petitioner's claim of denial of due process is to be determined by the norms of due process existing at the time of petitioner's conviction in 1936, it should hold that the district court correctly applied the standards obtaining at the time of petitioner's conviction to this case.

ARGUMENT.

I.

The concordant findings of the jury, the judge at petitioner's original trial, the trial judge on his post-conviction hearing, all of the justices of the Supreme Court of Illinois, the district judge and the Court of Appeals (one justice dissenting) in this case that petitioner's confessions were voluntary should not be disturbed.

Twelve jurors, the judge at petitioner's original trial, the judge who presided at relator's post-conviction hearing, a unanimous Supreme Court of Illinois, an experienced United States District Judge and a majority of the Court of Appeals have found that petitioner's confession was not obtained by violation of his Federal constitutional rights.

Although this virtual unanimity of judicial opinion is not binding upon this Court, it should not be disturbed unless compelling considerations require reversal.

Of course, this Court will review only uncontradicted matters of fact in a case assailing a conviction in a State court upon the grounds that a confession was allegedly obtained without due process of law. *Thomas* v. *Arizona*, 356 U. S. 390, 78 S. Ct. 885. In that case the Court was urged to weigh disputed testimony and reach a conclusion different from that of the original triers of fact and the State courts. The Court said:

> "Whatever the merits of the dispute, our inquiry clearly is limited to a study of the undisputed portions of the record. '(T)here has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such

conflict comes here authoritatively resolved (against petitioner) by the State's adjudication.' *Watts* v. *Indiana*, 338 U. S. 49, 51-52 1949). Time and again we have refused to consider disputed facts when determining the issue of coercion. See *Gallegos* v. *Nebraska*, 342 U. S. 55, 60-61 (1951); *Haley* v. *Ohio*, 332 U. S. 596, 597-598 (1948); *Ward* v. *Texas*, 316 U. S. 547 (1942). The rationale behind such exclusion of course, lies in the superior opportunity of trial court and jury to observe the witnesses and weigh the fleeting intangibles which may indicate truth or falsehood. We abide by the wisdom of that reasoning."

II.

The confession made by petitioner is demonstrably voluntary and not a product of coercion.

On the issue of "psychological" coercion, the test, if indeed we can find a statement of a test, as distinguished from a mere conclusion in each particular case, is probably best stated in *Stein* v. *New York*, 346 U. S. 156, commencing at p. 184, as follows:

> "This Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive.
>
> "Of course, such inquiries have limits. But the limits are not defined merely by calling an interrogation an 'inquisition,' which adds to the problem only the emotions inherited from medieval experience. The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing."

In that case the Court related its general rule to the specific facts in the case in saying:

"Of course, these confessions were not voluntary in the sense that petitioners wanted to make them or that they were completely spontaneous, like a confession to a priest, a lawyer, or a psychiatrist. But in this sense no criminal confession is voluntary.

"Cooper's and Stein's confessions obviously came when they were convinced that their dance was over and the time had come to pay the fiddler . . . That confession came at a time when he must have known that the police already knew enough, from Jeppeson and Brassett, to make this implication inevitable. Stein held out until Cooper had confessed and implicated him. Both confessions were 'voluntary,' in the only sense in which confessions to the police by one under arrest and suspicion ever are. The state courts could properly find an absence of psychological coercion." (Emphasis supplied.)

Thus the question is squarely raised: Was the confession made herein the product of continuous unrelenting police pressure in the sense that the petitioner confessed in order to avoid further interrogation or did he confess because he knew that the state was well aware of his participation in the crime and that nothing whatever could be gained by continued silence?

The answer is obvious when one considers the circumstances previously related surrounding his confession. We do not have, as is true in the many cases cited by petitioner, a situation where a process of continuous detention and relentless questioning ultimately brings forth a confession.

The record presents, instead, a situation wherein after the first accusation of the murder of Dr. Peacock the petitioner became ill and was, instead of being relentlessly questioned, immediately hospitalized. The following morning, questioned by the police, who were then informed of his guilt by virtue of the other boys' confession and reenactment of the crime he reiterated his denials.

Taken in the afternoon to the State's Attorney's Office where he was met by the then First Assistant State's Attorney, Mr. Wilbur Crowley, whom he was seeing for the first time, he again refused to confess, but did relate, after a very short time, a complete and comprehensive story of the crime, saying that it was told him by another. Thereupon, the other confessed murderers were brought in and petitioner *was not only accused by them but urged by Goethe to confess.* It was at this point that Reck admitted his guilt in the murder of Dr. Peacock. If we may adopt this Court's language in the *Stein* case, Reck's confession obviously came when he was convinced the dance was over and the time had come to pay the fiddler.

We first note that relator did not confess his participation in the killing of Dr. Peacock at any of the times when he was in private conversations with law-enforcing officers. It was not until he was confronted by his co-defendants Nash and Goethe that he confessed when they adjured him to do so.

The uncontradicted testimony of Wilbur Crowley, First Assistant State's Attorney at the time of petitioner's confession, is that after he, Crowley, had talked with the codefendants, he instructed that petitioner be brought into their presence. His testimony continues (*Bill of Exceptions at trial*, Vol. II, 226-8 to 226-20) as follows:

> "So I instructed that Reck be brought into their presence and I had Reck seated down in front of Nash and Goethe where he could face them, and then I sat alongside of them; and Captain Harry O'Connell was there, and yourself, Mr. Varnes was there, Chief of Detectives Sullivan was in that room, Captain Horan was there, Sargeant Reilly was there, and a few other officers were around at that particular time.
>
> "I said to Durland Nash, 'Do you know this man?' and I pointed to Reck. He said, 'Yes.' I said, 'Who is

that?' He said, 'Emil Reck.' I said to Robert Goethe, 'Do you know him?' He said, 'Yes, it is Emil Reck.' So then I asked Reck, 'Do you know these two boys?' Reck said, 'Yes,' and he named Robert Goethe and Durland Nash. Now, I said, 'Reck, have you had any trouble with either of these two boys?' He said, 'No.' 'Have you any ill feeling toward them?' He said, 'No.' I asked Nash and Goethe whether or not either of them had any ill feeling toward Reck, and they said, 'No.' I asked them if for any reason they would tell any lies about Reck, and they said they would not.

"So then I said to Durland Nash, 'Now, Durland, tell Reck what you have told us about the Peacock case.' Nash then told Reck in the presence of all of us that he was with them when they called up the Doctor and arranged for the Doctor to come over to 6438 North Whipple Street; that when the Doctor came there they intercepted him on his way into the house, they forced him back into the automobile and that Goethe sat in the front seat on the right-hand side and he, Durland Nash, drove the car. He told Reck that he sat in the back seat alongside of the victim, Dr. Peacock; that they drove up to the next block, the car stopped, that Reck and Goethe got out of the car with the Doctor, took him over on the sidewalk, that a struggle occurred over there; that Nash observed the struggle; in the course of the struggle the Doctor was struck by Goethe and that he did not fall right away; that Goethe then struck the Doctor on the head with the gun and that the Doctor, and I mean Goethe and Reck struggled with the Doctor, and carried his body over to the car near the automobile that had been some distance away, and that Reck struck him on the head with a club that Reck had concealed in his coat, struck him several times on the head, and that Nash had said to Reck, 'What you doing that for' and Reck said to him, 'I want to make sure he is dead.'

"So I said to Reck, 'What about it?' He hesitated a minute and did not answer, hung his head, and he said,

'I didn't do it.' Well, I said, 'Do you know of any reason why Nash would tell that story and lie about you?' He said, 'No.'

"I said, 'All right, Goethe, what about it? Did Nash tell Reck the truth about what occurred?' And Goethe said, 'Yes.' I said, 'Goethe, did you hit the Doctor?' and Goethe said, 'Yes, I did.' 'What did you hit him with?' 'I hit him with a gun.' 'Did anybody else hit him?' 'Yes.' 'Who hit him?' He said, 'Reck hit him on the head with the club he had.'

"So I said, 'What about it, Reck' and just then Goethe interrupted, 'Go ahead, Emil, tell them the truth about it, you know you were there, and you know we are not lying about it.' So I said, 'What about it, Emil, were you there? Did you do those things?' 'Well,' he said, 'I will tell you, I was there' but he said, 'I didn't hit him on the head.'

"I said, 'Why would these boys say you did hit him on the head if you didn't do it? Now, first of all, you lied and said you were not there. Now, you say you were there but you didn't hit him on the head. Are you willing to tell the whole truth about it to Mr. Kearney if he takes a statement?' He said, 'Yes.' I said, 'Well, you must tell the whole truth about it now; and what about this hitting?' I said, 'These boys apparently have accounted for the fact that he was hit once, but this man was hit several times, we know that, we have found the body.' So he said, 'Well, I didn't hit him.' 'Well, if you didn't hit him, who hit him?' He said, 'Mike Livingston.'

"I then directed that Mike Livingston be brought before Emil Reck, to confront Reck with regard to that statement to the effect that Mike Livingston was supposed to have hit him. In the meantime then I had another appointment, I had to leave, and did not get back then for about an hour after that.

"Q. Well, now when you came back, did you see these defendants again with the other defendants, Nash and Goethe in your office?

"A. Yes.

"Q. That evening? A. When I came back I saw the defendants, Nash and Goethe, they were still in your office. The defendants, Livingston and Reck, were in the police room sitting at a table; and if I remember correctly, were eating or playing cards at that time. That was about the hour of, I should judge, five-thirty P. M.

"Q. Now, I will show you a document that has been heretofore marked People's Exhibit 9 and direct your attention to the fourth section, 'Emil Reck, M. R. Livingston, Robert Goethe, and Durland Nash,' on the back page thereof; were you present when those signatures were attached?

"A. I was.

"Q. And who signed that document?

"A. Emil Reck signed the signature which appears as 'Emil Reck'; Michael Livingston signed the signature which appears as 'Michael Livingston'; Robert Goethe signed the signature which appears as 'Robert Goethe'; and Durland Nash signed the signature which appears as 'Durland Nash.' The witnesses—I signed the signature which appears 'Wilbert F. Crowley'; and 'H. J. O'Connell's' signature was signed by Captain Harry O'Connell, 'Bernard P. Reilly', that signature was signed by Officer Reilly.

"Q. And previous to the time that the signatures were affixed to that document by the defendant, what if anything had been done with it by you?

"A. I handed a copy to Michael Livingston, a copy to Robert Goethe, and a copy to Durland Nash. I told Reck to sit close to Mike Livingston, they were seated in front of me, with Reck on the left-hand side; as I faced them, on my left-hand side; then Livingston, then Goethe, and then Nash. I told Reck to push up close to Livingston so that they could both watch the same copy and follow me as I read. Reck at that time said he didn't care to follow along on that state-

ment, that he would listen to me; and I started to read the statement and I read it out loud and they turned the pages with me and followed. When I got to page 3 I read the question, 'Who do you live with?' and I read this answer, 'My mother and two sisters.' Reck said, 'Wait a minute, that is not correct; it should be. 'My father and two sisters.' So I said, 'All right, we will make a note of that so that when we are through we will make any corrections you boys want.'

"So I made a notation of that and at the conclusion of the statement, Reck was permitted to change that in his own handwriting and to O.K. it with his own initials. After completing the statements, reading it in its entirety, I asked the boys whether or not they would sign it and they said, 'Yes.' I then placed it before Emil Reck, and Emil Reck signed his name; and Michael Livingston then signed his name; then Robert Goethe was the third, and Durland Nash signed last. After the signatures were appended on it, and we had completed it and we were ready to leave for the evening, why some newspaper photographers were there and they asked permission to take pictures and I said, if the boys were satisfied to have their pictures taken, we had no objection. So the boys then sat around the table and posed for the picture like as though they were signing a statement. That was all that transpired that evening.

"Q. Now, did you see the defendants again on Sunday, March the 29th?

"A. Yes, I saw all of the defendants again on Sunday afternoon, March 29th.

"Q. Did anything transpire that Sunday afternoon?

"A. Statements were taken from each one individually and apart from the others.

"Q. But what was done with those statements? Will you tell the Court and jury?

"A. After the joint statement was taken, I had a conversation with Mr. Kearney. Subsequent to that I appeared at the State's Attorney's Office and met Captain Gilbert. That was about two P. M., and we had a discussion. After the discussion each of the defendants were then called in separately and individual statements were taken from them. While those individual statements were being written up, I made some telephone calls to certain men who sat as Foremen of past Grand Juries.

"Q. In this building? A. In this building. They had completed their services, and we were acquainted with them by virtue of the fact that they had served on Grand Juries; and I picked the names out from our list at random and called them.

Finally, and the following facts are most important, petitioner reiterated his confession, as did his co-defendants, before a panel of physicians, prominent private citizens and former foremen of grand juries.

"In the meantime I called doctors that were members of a committee at the Chicago Medical Society; and all of the parties were requested to be in our office as early as possible around the hour of seven P. M., that being the hour that we anticipated the writing of the statements would be completed.

"In the meantime after each defendant would complete his statement, I instructed that the defendant be taken over to the fifth floor of the Jail Building, where the administration quarters are, and where we have cots and beds and shower baths and a room that we have converted for the holding of prisoners we intend to use as witnesses. I instructed they be brought over there and be given an opportunity to take a shower and change clothes. In the meantime some of them had sent for clothes. Nash, I know, had some fresh clothes brought in to him, and he was given an opportunity to take a bath and change clothing over there. Each other prisoner as they completed their statement,

they were taken over there and allowed to bathe or freshen up, clean up, and then they were brought back when the men were all assembled and the statements had been completed so that we could read the statements to them in a group.

"Q. Now, I will show you People's Exhibit 5, were you present when the signatures were attached to that document?

"A. I was.

"Q. And People's Exhibit 6, were you present when the signatures were attached to that document?

"A. I was.

"Q. And People's Exhibit 7, were you present when those signatures were attached?

"A. I was.

"Q. And likewise, People's Exhibit [Exhibit number missing from transcript.] A. I was.

"Q. Were those documents all signed at approximately the same time under the same circumstances?

"A. Yes, sir.

"Q. Will you tell the Court and jury what was done immediately preceding the time the documents were signed?

"A. About the hour of seven P. M., several Doctors, including Dr. Scatcliffe, Dr. Day, Dr. Foley, Dr. Miller and a Doctor with an unusual name, appeared at our office, and a Mr. Frank Landon, a business man, appeared there; and in addition to that we had Mr. Buchner, Mr. Munickie, and Mr. Styles, who were Ex-foremen of Grand Juries. And we seated them around in Captain Gilbert's office. Then we arranged four chairs in front of them, and I sat behind the desk. I explained to the Doctors and the business men assembled, I said, 'The purpose of calling you men is to have you appear as witnesses in connection with the reading and signing of statements by the young men who have confessed in connection with the Peacock case.'

"After a somewhat clear statement about what their duties were to be, then I arranged to have the boys brought in, and they were brought in and they were sitting down. As they faced me, Durland Nash was on my left, Reck sat next to him, Goethe next to Reck, and Michael Livingston was on the, pardon me, I am wrong there—Goethe was on my left, Reck sat next to him, Nash sat between Reck and Livingston, who was on my right-hand side, so I read all the statements in which the boys faced me. I read Michael Livingston's statement first; then I read the statement of Nash—

"Mr. Boyle: Livingston's is People's Exhibit—

"A. People's Exhibit 6; and I asked the boys each to pay attention while I read the statement; but I only gave a copy of the statement to the boy who was the one that made it, so I gave Livingston a copy of his own statement, and he followed as I read, and I read loud enough so that everybody in the room could hear me. After completing Livingston's statement, he said there was one minor correction. I don't even know whether we made it, the answer was 'V' instead of 'V-8' and he corrected me on that, he said it should be 'V-8'.

"Then I read the statement of Durland Nash; and then I read the statement of Emil Reck; and last, I read the statement of Robert Goethe. I asked the boys if they had anything they wanted to say at that time. They did not have anything to say at that particular time. So I asked them if they would sign them, so they said they would. So the boys then each signed their own statement.

"Q. What, if anything, was said about the truthfulness of this statement by any of the boys?

"A. I don't recollect anything now, at that particular time. At the conclusion of the statements, I can't recollect anything that was said about that at that time.

"Q. Then after they were signed by the defendants, the other gentlemen signed, you said?

"A. After they were signed by the defendants, then all the parties there present signed as witnesses to the statements."

It thus appears that petitioner not only confessed to Crowley but reiterated his confession in the presence of a committee of physicians, foremen of grand juries that had investigated the case and other unofficial citizens.

To be sure, this panel of physicians, foremen of grand juries and other citizens who were not law-enforcing agents did not know the circumstances that preceded petitioner's acknowledgment of his guilt in their presence. But the jury and the Illinois courts knew those circumstances. Among the committee were *physicians*, none of whom perceived any physiological, neurological or psychological *stigmata* such as those claimed by petitioner many years after his conviction.

This is one of the few cases in the country and, as far as we are aware, the only case that has reached this Court where physicians not employed by any government attested to the voluntary character of an admission of guilt.

The decision of this Court that is most nearly apposite to the present case is *Lisenba* v. *California*, 314 U. S. 219, decided in 1941.

That case, like the present case, is one in which the defendant was accused of a shocking murder, persisted in his denial of guilt at all of the times during persistent inquiries by state law-enforcing and prosecuting officials *under circumstances which all of the members of this Court denounced as illegal* and did not confess until, as was true in the instant case, he was confronted by the accusations of a codefendant.

More particularly, Lisenba, also known and referred to as James by the Supreme Court of the United States, was

arrested for the murder of James' wife under horrifying circumstances that are narrated at length in the opinion. James was held incommunicado from April 19, 1936, until May 2nd of that year, *a period of two weeks, during which time he was continually questioned and consistently proclaimed his innocence.*

On May 2nd, twenty-one days after James' arrest, Hope James' codefendant, who had been arrested on May 1st, implicated James. James, confronted by Hope's statements incriminating him, confessed.

To be sure, James had consulted an attorney, which is not true with respect to petitioner.

But the *rationale* of the decision of this Court was not that James had talked to an attorney but that the lower courts were justified in finding that notwithstanding what this Court declared to be "the violations of law involved in the treatment of petitioner," he confessed because he was implicated by a co-defendant.

The court said at pages 240-241:

> "Like the Supreme Court of California, we disapprove the violations of law involved in the treatment of the petitioner, and we think it right to add that where a prisoner, held incommunicado, is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession, he is deprived of liberty or life through tyrannical or oppressive means. Officials of the law must realize that if they indulge in such practices they may, in the end, defeat rather than further the ends of justice. Their lawless practices here took them close to the line. But on the facts as we have endeavored fairly to set them forth, and in the light of the findings in the state courts, we cannot hold that the illegal conduct in which the law enforcement of-

> ficers of California indulged, by the prolonged questioning of the prisoner before arraignment, and in the absence of counsel, or their questioning on May 2, coerced the confessions, the introduction of which is the infringement of due process of which the petitioner complains."

It is true that in the *Lisenba* case, the defendant admitted that he would not have made his confession but for the accusation of his co-defendant. In the instant case, the findings of the jury and all of the judges who have reviewed petitioner's contentions clearly take the place of such an admission on the part of petitioner.

Also similar to the instant case is *Gallegos* v. *Nebraska*, 342 U. S. 55, decided in 1951. In that case, the defendant, one Gallegos, was illegally detained for *twenty-five days* by federal and state officers before he was brought before a magistrate and confessed. He claimed "physical torture and threats of torture, mental duress, illegal transportation and illegal detention" in violation of the Federal and State constitutions.

In that case, as in this case, there was a conflict of evidence as to whether the defendant was maltreated by officers.

The Supreme Court of the United States held that twenty-five days of concededly illegal detention, there being a dispute as to whether the accused was physically maltreated, did not require the exclusion under the due process clause of the accused's confession.

The court said at pages 65-66:

> "So far as due process affects admissions before trial of the defendant, the accepted test is their voluntariness. This requires appraisal of the facts of each particular case open to consideration by this Court. In recent cases, where undisputed facts existed far

more likely to produce involuntary confessions than those in this case, there was disagreement as to whether due process was violated. The facts here to support a claim of denial of due process are not so convincing."

In the *Lisenba* case, 314 U. S. 219, the *Gallegos* case, 342 U. S. 55, and the instant case, the defendants were detained, the detention in the *Lisenba* case being for 21 days, in the *Gallegos* case, for 25 days, and in the instant case, for only *four* (although only a few minutes on Friday and a few hours on Saturday concerned the crime for which he stands convicted) days prior to confessing. In the *Gallegos* case there was a claim, denied by the officers and rejected by the State courts, of brutality or "coercion" during the period of unlawful detention.

In the *Lisenba* and *Gallegos* cases, this Court refused to disturb the findings of the State courts that the confessions were obtained upon admittedly unlawful detention.

The learned and experienced district judge held in this case that petitioner's claim of denial of due process must be tested by the due process clause, that clause to be read as it was expounded by the Supreme Court of the United States as of the year 1936, the year of petitioner's conviction, and not by the subsequent expansion of that clause by such cases as *Chambers* v. *Florida*, 309 U. S. 227 and *Ashcraft* v. *Tennessee*, 327 U. S. 274, and other later decisions that expatiate upon the scope of the due process clause in cases of confessions.

III.

The district court's finding that petitioner's confession was extracted from him by "psychological coercion," coupled with that court's finding that the confession was not extorted by "physical coercion," was so "clearly erroneous" that the Court of Appeals was not bound to accept it and this court should not sustain it.

This Court's Rule 52 of the Rules of Civil Procedure provides that "in all actions tried upon the facts without a jury or with an advisory jury," the court's findings of fact

> "shall not be set aside unless clearly erroneous, *and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*" (Emphasis supplied.)

Although the text of the rule refers to "all actions tried upon the facts without a jury," its context makes it plain that it is designed for those cases in which the district court tries issues of fact as a court of first instance.

The rule was not written for cases in which State courts have heard the witnesses, appraised their credibility, assayed the weight of the evidence and made explicit pronouncements as to their findings of fact.

A district judge who considers a petition for *habeas corpus* solely upon the record made in State courts has no more opportunity to "judge the credibility of the witnesses" than have the judges of a Court of Appeals or than this Court has.

Such a district court has less opportunity to "judge the credibility of the witnesses" than had the jury and the trial judge to whom a case was tried in the State trial court. Nor does he have the benefit, the inestimable value of which this Court knows better than can any lawyers, of consultations with other members of a collegial bench.

Where a district judge reaches a conclusion of fact that is contrary to the finding of a jury and a trial judge who has heard the witnesses and to the opinion of a State Supreme Court, which did not hear the witnesses but has had as good an opportunity to appraise their credibility as had a district judge who reads only the same record, the findings of the district court have the same import that is accorded to the findings of a lower court or administrative tribunal that has seen and heard the evidence.

In so far as the district court in this case found that petitioner's confession was not wrested from him by physical coercion, that court's findings comport with those of the jury, two Illinois trial judges, a unanimous Supreme Court of Illinois and all of the judges of the Court of Appeals: for although Judge Duffy dissented, he did not disturb the district court's finding that petitioner's confession was not the product of "physical coercion."

We therefore argue in this Court the question whether petitioner's confession was obtained by "physical coercion" as a question that this Court may answer for itself.

The Court of Appeals did not explicitly discuss the district judge's finding that the confession was the product of "psychological coercion." But that court clearly expressed its disagreement with that finding in the following passage of its opinion (274 F. 2d 250, p. 253):

> "Invoking the aid of the fourteenth amendment tto the constitution of the United States, Reck now contends that his confessions were the product of coercion, citing his lengthy detention incommunicado and the illness which developed during that period of time. We are convinced, however, that the evidence proves that none of the treatment which he received while he was being detained prior to Saturday afternoon produced the confessions by Reck. While he had become ill when Captain Aiken on Friday night probingly accused him of the Peacock killing, his rugged determination to say nothing to reveal his involvement in that

affair had prevented the authorities from obtaining any incriminatory admission from him in regard to that crime until Saturday afternoon in the office of the state's attorney. Until then, Reck, the strong man of the group, had stood fast and on this occasion it was only the realization that Goethe and Nash had confessed the Peacock killing and had implicated him, and had, in the presence of Crowley called upon Reck to tell 'the truth about it, you know you were there, and you know we are not lying about it', that Reck realized that the 'dance was over and the time had come to pay the fiddler'. The latter words are quoted from *Stein* v. *New York*, 346 U. S. 156."

In considering the question whether petitioner's confession was the product of "psychological coercion," the facts summarized in the next paragraph are material. Indeed, we submit that they are controlling:

Petitioner became ill *immediately* upon being questioned concerning the slaying of Dr. Peacock. Yet he was steadfast in his denials of guilt, notwithstanding "nervous reactions" that were sufficient to make him intermittently very ill but not sufficient to prevail upon him to confess, until *after* his co-defendants had admitted their guilt.

The record supports the inference drawn by the jurors, all of the State judges who have reviewed this case and two judges of the Court of Appeals that the fact that petitioner became ill immediately upon being accused of Dr. Peacock's murder, when the illness could not have been the result of coercion, but did not confess to that murder until he was implicated by his co-arrestees of the killing meant that he did not yield to psychological pressure but that the "confession came at a time when he must have known that the police already knew enough, from [petitioner's co-arrestees], to make his implication inevitable," and that he "held out until after [his co-arrestees] had confessed and implicated him."

Any jury might find and most jurors would find that an accused who has not become unwell when questioned about

many crimes but becomes ill *immediately* upon being asked about a certain crime feels illness as the result of guilt when he subsequently confirms guilt by a reiterated confession.

Respondent therefore urges that the district court's finding that petitioner's confession was the result of "psychological coercion" is not only overborne by the contrary findings in the State courts and of the Court of Appeals but is in conflict with the district court's finding that that confession was *not* the result of "physical coercion."

Respondent therefore submits that the district court's finding of psychological duress is clearly erroneous.

IV.

If this Court sustains the district court's finding that petitioner's confession was the product of "psychological coercion", and we submit that it should not sustain that finding, then it should also sustain the district court's holding that the question of due process in this case should be answered in accordance with the constitutional norms prevailing at the time of petitioner's trial and conviction.

Respondent submits that this Court need not determine whether the constitutionality of petitioner's conviction is to be judged by the tests of due process declared by the Supreme Court of the United States as of 1936 or in the light of later cases; for under any norm recognized by this court at this time until the present, the State courts were justified in finding that petitioner's claims of brutality were false and that it was confrontation by petitioner's co-defendants, not the exertions of law-enforcing officers, that induced his voluntary confession to the crime of murder.

If, however, the court deems it is confronted by the question whether petitioner's conviction must be judged by the standards of 1936 or retrospectively by expanded standards, we press upon the court the excellent opinion of the district court.

We adopt, not as binding upon this Court but as expository of our own argument, the following passages from the opinion of the district court:

"As Justice Frankfurter so well said in *Griffin* v. *Illinois*, 351 U. S. 12, 25 and 26:

"We must be mindful of the fact that there are undoubtedly convicts under confinement in Illinois prisons, in numbers unknown to us and under unappealed sentences imposed years ago, who will find justification in this opinion, unless properly qualified, for proceedings both in the state and the federal courts upon claims that they are under illegal detention in that they have been denied a right under the Federal Constitution. It would be an easy answer that a claim that was not duly asserted—as was the timely claim by these petitioners—cannot be asserted now. The answer is too easy. Candor compels acknowledgment that the decision rendered today is a new ruling. Candor compels the further acknowledgment that it would not be unreasonable for all indigent defendants, now incarcerated, who at the time were unable to pay for transcripts of proceedings in trial courts, to urge that they were justified in assuming that such a restriction upon criminal appeals in Illinois was presumably a valid exercise of the State's power at the time when they suffered its consequences. Therefore, it could well be claimed that thereby any conscious waiver of a constitutional right is negatived.

"The Court ought neither to rely on casuistic arguments in denying constitutional claims, nor deem itself imprisoned within a formal, abstract dilemma. The judicial choice is not limited to a new ruling necessarily retrospective, or to rejection of what the requirements of equal protection of the laws, as now perceived, require. For sound reasoning, law generally speaks prospectively. More than a hundred years ago, for instance, the Supreme Court of Ohio, confronted with a problem not unlike the one before us, found no diffi-

culty in doing so when it concluded that the legislative divorces were unconstitutional. *Bingham* v. *Miller*, 17 Ohio 445. In arriving at a new principle, the judicial process is not impotent to define its scope and limits. Adjudication is not a mechanical exercise nor does it compel 'either/or' determinations.

"We should not indulge in the fiction that the law announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law. That this is consonant with the spirit of our law and justified by those considerations of reasons which should dominate the law, has been luminously expounded by Mr. Justice Cardozo, shortly before he came here and in an opinion which he wrote for the Court. See Address of Chief Judge Cardozo, 55, Report of New York State Bar Assn., 263, 294 et seq., and *Great Northern R. Co.* v. *Sunburst Oil and Refining Co.*, 287 U. S. 358, 363-366. Such a molding of law, by way of adjudication, is peculiarly applicable to the problem at hand. The rule of law announced this day should be delimited as indicated."

"It is my opinion that, generally speaking, the Due Process Clause must likewise speak prospectively in Habeas Corpus cases with the emphasis upon the discretion of the individual district judge in each case. Historically, judges have always had a certain degree of discretion in cases of this nature. In England today, the trial judge may, in his discretion, admit a confession into evidence even though the Judge's Rules have been violated. *R.* v. *May*, 36 Cr. App. Rep. 91. The Supreme Court of the United States has recently recognized this principle in its approach to the problem of integration. It is my opinion that this same approach must be taken in cases such as the one at bar. A district judge, with the record before him, looking

beyond the *total circumstances,* should not be bound absolutely by this test.

"During my many years on the Bench, I have watched with great interest and satisfaction the vitalization of, the Due Process Clause through Supreme Court interpretation. However, I have also been aware of the practical aspects of such interpretation as herein enumerated. I am convinced from the language of the *Bartkus* (355 U. S. 281) and *Griffin* cases, (351 U. S. 12) that the United States Supreme Court is likewise aware of these problems. If, with great respect, I may conjecture, this might be the reason the Supreme Court denied Certiorari in the instant case.

"Re-evaluating the Due Process Clause as used in Habeas Corpus cases wherein the petitioner has been imprisoned throughout an era in which the Clause has undergone a changing interpretation, it is my opinion, based upon the history of the Clause, the practical aspects of the problems and the recent pronouncements of the United States Supreme Court, that in each case, the *totality* of circumstances test must be weighed against the 'relevant and conflicting factors' as interpreted by the 'conscience of society' with the final decision resting in the sound discretion of the judge. Exercising such discretion to the best of my ability in the light of all the factors herein set forth.

"I hold the Due Process Clause not violated in the instant case."

As Mr. Justice Frankfurther declared in his concurring opinion in *Griffin* v. *Illinois,* 351 U. S. 12, quoting Mr. Justice Brandeis in *United States* v. *Great Northern Ry. Co.,* 287 U. S. 58, courts may and should accomplish "such a molding of law, by way of adjudication," that the law may speak only "prospectively". *This he did in expounding the Constitution,* not in fashioning the common law for the District of Columbia or expanding a statutorily adopted

concept of the common law in a tax case or a case involving a tort.

But, as we have steadfastly contended, this Court need not determine whether petitioner's case is to be judged by the law of 1936 or the law of 1959; for the State courts were justified, as was the Court of Appeals, in holding that petitioner's claims of brutality were false, that it was confrontation by his accomplices, not coercion, which produced his confession and that petitioner has not been denied due process under any standards that this court has ever applied.

Conclusion

For the reasons urged in this brief, it is respectfully submitted that the judgments of the district court and of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,

WILLIAM C. WINES,
A. ZOLA GROVES,
RAYMOND S. SARNOW,
Assistant Attorneys General of Illinois,
160 N. La Salle Street, Suite 900,
Chicago (1) Illinois, (FInancial 6-2000),

Counsel for Respondent.

Certificate of Service.

WILLIAM C. WINES, a member of the Bar of this Court, hereby certifies that he has served three copies of the foregoing Brief of Respondent by mailing same, first class postage prepaid to:

Anthony Bradley Eben,
Richard A. Siegal,
135 South La Salle Street,
Chicago, Illinois.

Donald Page Moore,
105 West Adams Street,
Chicago, Illinois,
Counsel for Petitioner.